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Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Pender v. Jackson*, No. 7896 (Utah Supreme Court, 1952).

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

DEC 18 1952

RENNOLD PENDER,

Plaintiff and Appellant, Salt Lake Supreme Court, Utah

— vs. —

T. C. JACKSON and RUBY G.
JACKSON, his wife, CHARLES
E. DAVEY, and JANE DOE
DAVEY, whose true name is un-
known, RALPH M. DAVEY, and
BETH S. DAVEY, his wife, et al.,

Defendants and Respondents.

Case No. 7896

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE WILL L. HOYT, JUDGE

IRWIN CLAWSON

*Attorney for Defendants and
Respondents Daveys*

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BETH S. DAVEY, his wife, et al.,

Defendants and Respondents.

Case No. 7896

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The statement of facts made by appellant is substantially correct. There are some few points of difference which will be treated at the appropriate places in the argument.

STATEMENT OF POINTS

POINT I

PENDER MUST SHOW HE TOOK POSSESSION AND THAT THE SAME WAS CONTINUOUS, HOSTILE, OPEN, NOTORIOUS AND EXCLUSIVE.

POINT II

PENDER NEVER TOOK POSSESSION.

POINT III

CASUAL OCCASIONAL TRESPASSES CANNOT BE USED TO BASE A CLAIM FOR ADVERSE POSSESSION.

POINT IV

THE DOCTRINE OF DAY VS. STEELE PRECLUDES RECOVERY BY APPELLANT.

POINT V

PENDER DID NOT OCCUPY THE LAND CONTINUOUSLY NOR HOSTILELY NOR OPENLY NOR EXCLUSIVELY NOR NOTORIOUSLY.

POINT VI

DISCUSSION OF APPELLANT'S ARGUMENT THAT THE RULE OF TELONIS VS. STALEY SHOULD BE ABROGATED.

POINT VII

ABANDONMENT OF TELONIS RULE WOULD NOT HELP APPELLANT BECAUSE ASSESSMENT WAS AGAINST DAVEY, ET AL., WITHOUT NAMING THE OTHER OWNERS.

ARGUMENT

POINT I

PENDER MUST SHOW HE TOOK POSSESSION AND THAT THE SAME WAS CONTINUOUS, HOSTILE, OPEN, NOTORIOUS AND EXCLUSIVE.

“To acquire title by adverse possession, therefore, under our statute, the possession must not only be continuous for the time prescribed, but, under well-settled law, must be actual, open, and notorious, with an intention on the part of the claimant to claim the title as owner, and against the rights of the true owner; * * *.” *Dignan et al v. Nelson et al*, 26 U. 186, 72 P. 936.

POINT II

PENDER NEVER TOOK POSSESSION.

Contrary to the statement of counsel (Appellant's Brief page 6) wherein he says: "It is patently evident and not controverted (Rec. 17-19, 45-52) that appellant took possession of the ground . . .", it is controverted that appellant ever took possession and it is also controverted that he held it for seven years. Section 104-12-7 of Chapter 58 Session Laws of Utah 1951 provides:

"In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action."

There is some relaxation of the requirement for physical possession of the whole tract when the property is held under a written instrument (Sec. 104-12-8, same Laws). But the requirements for obtaining possession under a written instrument is also circumscribed by statute. Section 104-12-9 of the same chapter and laws provides:

"For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

(1) Where it has been usually cultivated or improved.

(2) Where it has been protected by a substantial inclosure.

(3) Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purpose of husbandry, or for pasturage or for the ordinary use of the occupant.

(4) Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining county is deemed to have been occupied for the same length of time as the part improved and cultivated.”

Now the only cultivation of the property was a disking which was given the property in 1949. So it can't be claimed that the property was cultivated for seven years to qualify under 104-12-9 (1). It is not claimed that the property has been improved, so that disposes of all of subparagraph (1).

It is not claimed that the property has been fenced (Tr. 51, lines 26 and 27), so subparagraph (2) should be eliminated as a basis for claiming adverse possession.

As to subparagraph (3), this is vacant land and there is no evidence of Pender having used the property to supply fuel or fencing timber. Nor is there any evidence of its use for pasturage. This leaves only the use “for the ordinary use of the occupant.” This will be considered below.

The provisions of subparagraph (4) seems equally

inapplicable in the absence of any evidence to substantiate such a claim.

Now returning to the only part of Section 104-12-9 of which no disposition was made, was the land occupied "for the ordinary use of the occupant"? It is argued that the ordinary use that the plaintiff and appellant makes of the land he buys is for "investment, rental or speculative venture" (Appellant's brief, middle of page 11). But this is the purpose for which the land is held, not the use made of it. If the purpose of holding was equivalent to use, a tax title purchaser would never need to go on the land to make good his claim to adverse possession.

Using land, which was chiefly valuable for farming and grazing, for pasturage has been held to be possession for the ordinary use. (*Adams vs. Lamicq*, U., 221 P. 2d 1037).

What would be an ordinary use of this land? Appellant thought that farming would be such a use, for he says that is one of the things he contemplated. He testified that in 1941 he thought about plowing the property but he didn't do it (Tr. 45, line 24). In 1943 he thought he might put in a garden (Tr. 46, line 22). In 1944 he thought of various crops he could put in (Tr. 47, line 4). In 1945 he thought of putting in corn (Tr. 47, line 17), and in 1949 he thought about farming it again and actually disked part of it (Tr. 50, line 8). But he never farmed the land nor did any of those things except to disc the property in 1949, two years before commencing suit.

There are store buildings a few rods to the west of

the tract in question, but on to our land he neither moved nor built a store or home. He didn't even fence the property. That is a statutory method of which he, with his wide knowledge of claiming adverse possession under tax titles, doubtless knew. But he didn't choose to fence the property. Was it because that would have been too obvious that he might try to claim adverse possession? Did he, with all his experience as a tax title purchaser, feel that by being less obvious he might be able to successfully claim title by adverse possession without letting the owner know that he, the appellant, was claiming possession?

POINT III

CASUAL AND OCCASIONAL TRESPASSES CANNOT BE USED TO BASE A CLAIM FOR ADVERSE POSSESSION.

"To ripen into title, it is necessary that an adverse claimant's possession operate as an ouster of the possession of the true owner. 1 Am. Jur. Sec. 142 (page 875); *Strauss vs. Canty*, 169 Cal. 101, 145 P. 1012." *Adams vs. Lamicq*, U., 221 P. 2d 1037, 1040; *Bingham Livery & Transfer Company vs. McDonald*, 37 U. 457, 110 P. 56.

Can it be said that the annual and fleeting visit of appellant to post a small card-board sign on a tree back of the property, was such a possession as to "operate as an ouster of the possession of the true owners"? Respondent Ralph Davey testified that although he visited the property frequently, he found only one sign on the tree stump, and that was in 1949 (Tr. 80, line 29). Suppose he had seen in 1940 or 1941 appellant in possession or had otherwise gotten the idea that, though appellant

had an invalid tax title, he was going to try to claim title by adverse possession. Let us further suppose that this was oil land or otherwise of great value so as to warrant the posting of a guard on the property on a twenty-four hour a day basis, 365 days a year, so as to promptly evict appellant and all other trespassers, would Davey have had any assurance that his guard would have caught appellant when he made his annual visit to the property? The guard could have gone to the nearby store for a package of cigarettes and have lost the opportunity to evict Mr. Pender, so fleeting were his visits.

It is not the casual or occasional trespass, and certainly not a mere annual visit, which operates as an ouster of the possession of the owner. Under Section 104-12-7, Chapter 58, Session Laws of Utah 1951, the possession of the tract is presumed to be in the real owner unless the adverse claimant has "held and possessed adversely to such legal title for seven years."

Appellant never took possession of the land, let alone held it adversely for seven years. At most he merely trespassed on the land briefly once each year for ten years.

POINT IV

THE DOCTRINE OF DAY VS. STEELE PRECLUDES RECOVERY BY APPELLANT.

In the case of *Day vs. Steele*, (111 U. 481, 184 P. 2d 216) the tax title claimant paid the taxes and allowed someone to place a commercial sign on the property and permitted still another party to store junk on a part of the land and allowed a carnival to occupy it for a week.

He had the property surveyed and put in corner posts and later replaced the same when removed. He had a water meter put in the street for future connection. He allowed the dumping of dirt on the land, did some leveling of it, and a few days each year the claimant grubbed at the weeds and greasewood, and the last year he moved a small building on the property. He and many others crossed the land frequently. This was held to be insufficient to show possession. In discussing the sufficiency of the leveling of the ground, etc., as an improvement, this court said in part:

“In the instant case although there was a slight leveling of a small portion of the property claimed by adverse possession it was not done to an extent that was noticeable. The weeding was done in such a manner that the weeds soon flourished again, and the dumping of the few loads of dirt on the grounds did not change its appearance or enhance its usefulness as property upon which a business could be located. Under such circumstances we are of the opinion that the property was not improved in the manner usual to improve that kind and character of land for the uses to which it could be put. It is true a building was placed on the property a few months before appellant instituted this suit, but even though this is clearly an ‘improvement,’ it is apparent that it has not been there a sufficient length of time, nor that preliminary work for its placement had been done for the statutory period. *Day vs. Steele*, 111 U. 481, 184 P. 2d 216, 219.”

Then the court discusses the matter of whether the claimant ever took possession of the land. After observ-

ing that this was vacant property in the city of Delta and that the party who stored his junk on this lot did likewise with other vacant property in the vicinity and that the carnival also used nearly vacant lots, this court observed that "these acts were not of unequivocal character indicating ownership . . .", and then went on to say:

"Not only from the nature of the use were the acts not calculated to give notice that someone was claiming to use the land as a matter of right by reason of ownership, but the uses did not continue for the statutory length of time. Rather the length and type of use was more in the nature of trespassers using vacant lots for dumping and other purposes. Many persons used these lots as a shortcut from one street to another. The lots were also used as a camping ground by strangers without permission from anyone. Under such conditions we are of the opinion that respondents have failed to prove that their possession was continuous, hostile, open, notorious and exclusive, and of such a character as to give notice to the owner and the world that it was being held adversely and under claim of ownership." (*Day vs. Steele*, 111 U. 481, 184 P. 2d 216, 219.)

In *D. H. Perry Estate vs. Ford*, 46 U. 436, 151 P. 59, 65, the court, by Chief Justice Straup, said:

"As stated by Mr. Justice Frick, the evidence to support the defendant's title by an adverse holding is not strong. I think it weak and insufficient for this: The defendant's possession and occupancy or use of the strip was not of such a character as was calculated to give the owner, or the world, notice of an adverse holding, and to enable the plaintiff, against whom it is claimed to have been exercised, to know about it, and to resist

the acquisition of the right before the period of limitation had run. The strip in dispute was not inclosed nor cultivated nor improved by the defendant. His possession and occupancy consisted principally in this: He cut a doorway in the south side of the shed which abutted the disputed strip on the north, and through which he took horses in and out of the shed, and threw manure from the shed, and left wagons stand partly on the strip and partly on uninclosed and unoccupied lands to the south of the strip. In such manner the defendant used not only the disputed strip, but also, and of necessity, so used additional, open, uninclosed, and unoccupied ground to the south of the strip, which additional ground confessedly belonged to the plaintiff, and admittedly was not acquired adversely or otherwise by the defendant. It is not uncommon for one neighbor to let vehicles stand on uninclosed and unoccupied ground of another, to lead or drive horses over it, and to throw manure and rubbish on it. All that may be a trespass or a nuisance; but it hardly is such a possession or occupancy as is calculated to give the owner notice of an adverse holding, and knowledge to him that, if he does not take steps to interrupt the occupancy, it will ripen into a title by limitation. The chief ground on which a disseisor acquires title by adverse possession is laches of the owner, his seeing his boundary and land invaded by an adverse claimant asserting title, and himself remaining passive and acquiescing in such adverse claim and assertion. Hence the general rule that the possession of an adverse claimant must be continuous, exclusive, open, hostile, notorious, and of such character as to enable the owner to know of the invasion of his rights. I do not think the defendant's possession or occupancy or use of the strip was of that character."

In the case at bar there was no act which would put the owner on notice that this tax title claimant was attempting to gain title by adverse possession. He never took possession of the land. He never occupied it.

POINT V

PENDER DID NOT OCCUPY THE LAND CONTINUOUSLY NOR HOSTILELY NOR OPENLY NOR EXCLUSIVELY NOR NOTORIOUSLY.

Under the case of *Dignan vs. Nelson*, 26 U. 186, 72 P. 936, quoted supra in Point I, the following steps are necessary to show adverse user:

“To acquire title by adverse possession, therefore, under our statute, the possession must not only be continuous for the time prescribed, but, under well-settled law, must be actual, open, and notorious, with an intention on the part of the claimant to claim the title as owner, and against the rights of the true owner; and, in addition to all this, the adverse claimant must pay all the taxes which are lawful charges upon the land.” (*Dignan vs. Nelson*, 26 U. 186, 72 P. 936, 937.)

“To be adverse, so as to vest title after the lapse of the statutory period, possession must be hostile and under claim of right, actual, open and notorious, exclusive, continuous and uninterrupted. All of these elements must exist and concur.” (2 C.J.S., p. 520.)

Pender’s “occupancy”, if the fleeting visit could be called such, was not continuous but a visit once a year (Tr. 45, line 4 et seq., where what claimant did on all of his visits, is detailed). Visiting the property annually is not continuous possession. No one representing claim-

ant was left in charge of the property during the other 364 days and 23-1/2 hours each year claimant was not there.

Nor was Pender's "occupancy" hostile. He did not attempt to keep the owners, the Daveys, off the property.

Nor was this tax title claimant's "occupancy" open. It was just the antithesis of "open". It was sly, stealthy, furtive, and secretive.

If we take Pender's testimony at full value, he only went there annually at odd times, just long enough to put up a little cardboard sign and knock down whatever of last year's weeds might obscure the sign on the stump.

Nor can it be said that his "occupancy" was exclusive. There is absolutely no evidence of any attempt on Pender's part to keep anyone off the property except a protest which he testified he made to the school board, which he stated resulted in that board erecting a fence between their property and that in dispute. But, aside from that testimony, there was no evidence that anyone was excluded from the property. It was open to the world and all who chose went on it, at their pleasure. Certainly, if he had any possession it was no more exclusive than that of the claimant who failed in *Jenkins vs. Morgan*, 113 U. 534, 196 P. 2d 871. In fact, appellant's possession was even less exclusive because in the Morgan case there was only a Mr. Okleberry who grazed the land, while in the case at bar anyone used the land who cared to do so.

Nor was there any notoriety about the Pender claim. No evidence was shown that his claim of adverse possession was known to anyone except such as could be de-

ducted from the fact that he put up little cardboard signs back on a stump (which sign was placed so low that it was necessary to clean out the weeds so it could be seen). Two witnesses saw a sign in 1949 or thereafter. Davey saw one such sign (Tr. 80, line 29) after March, 1949, which he tore down and destroyed (Tr. 81, line 1 et seq.). Moroni Fox, who lived directly across the street from the property in litigation and had throughout the period in issue here, saw only one sign on the property and that was in 1949, 1950 or 1951 (Tr. 76, line 21 et seq.). He passed the property twice daily and frequently sat on his porch facing the property, but that was the only sign he saw.

Mr. Choules, who also resided across the street and saw the property four to six times a day for twenty-two years, never saw a single sign (Tr. 58, line 3 et seq.).

This witness' wife, May H. Choules, who lived opposite the property and passed it, walking or riding, very often for twenty-one years, never saw a sign on the property (Tr. 62, line 4 et seq.).

Mr. William A. Cannon, who lived and had a barber-shop on 23rd East Street just south of 33rd South Street and facing the property, never saw any signs (Tr. 65, line 30 et seq.).

There was just no evidence of notorious user.

In the absence of any showing that the appellant had possession and that the same was continuous, hostile, open, notorious, and exclusive, the appeal should be dismissed.

POINT VI

DISCUSSION OF APPELLANT'S ARGUMENT THAT THE RULE OF TELONIS VS. STALEY SHOULD BE ABROGATED.

It is urged that the doctrine of *Telonis vs. Staley*, 104 U. 537, 144 P. 2d 513, should be overruled.

The doctrine of that case, decided in 1943, has become firmly established as a part of the law of this state. It has been cited with approval and followed in these cases: *Equitable Life & Casualty Insurance Company vs. Schoewe*, 105 U. 569, 144 P. 2d 526; *Tree vs. White*, 110 U. 233, 171 P. 2d 398, 400; *Jenkins vs. Morgan*, 113 U. 534, 196 P. 2d 871, 874; *Sperry vs. Tolley*, 114 U. 303, 199 P. 2d 542, 545; *Valley Investment Company vs. Los Angeles & Salt Lake Railroad Company*, U., 225 P. 2d 722, 723; *Dowse vs. Kammerman*, U., 246 P. 2d 881, 882.

To overturn this well established law would throw doubt and uncertainty where the rule is now well known and is being observed.

The only ground advanced for such a departure from the well established and widely known rule of that case and for adventuring into the realms of uncertainty is that the California court in *Steele vs. San Luis Obispo*, 152 Cal. 785, 93 P. 1020, did not permit a tax payer to recover taxes in proceedings against a taxing unit. That decision is not one of this court. Whether this court will follow the ruling if the case is presented, is unknown. So the argument is that the well established doctrine of *Telonis vs. Staley* should be reversed because this court might

follow the California court if the question presented there is ever raised in the State of Utah. Surely such conjectures are not the basis for rulings of this court. The statute requires these affidavits to be attached to the rolls to establish the authenticity thereof. This court has repeatedly held that the statutory requirement is mandatory in order to make a tax sale valid. This well established rule should not be abrogated upon the conjecture that the court may not be willing to follow the reasoning thereof into other fields.

POINT VII

ABANDONMENT OF TELONIS RULE WOULD NOT HELP APPELLANT BECAUSE ASSESSMENT WAS AGAINST "DAVEY, ET AL.," WITHOUT NAMING THE OTHER OWNERS.

But even if the rule of *Telonis vs. Staley* was overruled, this would not change the decision below. The assessment on which this sale was made was against "Chas. E. Davey, et al." (Tr. 15, lines 14 to 16). The title at that time, according to the abstract, was vested in the following persons: Chas. E. Davey, one-third, Ether M. Davey, one-third, and Mary D. Cutler, one-third (Abstract of Title, Exhibit 3, entry 11, showing the fee title was transferred to all three, which deed, the abstract shows, was recorded in Book 42 at page 82, office of the Recorder of Salt Lake County, Utah). Such an assessment was invalid. Section 80-5-12, Utah Code Annotated, 1943, provides:

"If the name of the owner or claimant of any property . . . appears of record in the office of the county recorder where the property is situated,

the property must be assessed to such name. . . .”

In *Asper vs. Moon*, 24 U. 241, 67 P. 409, the record title was in “W. H. and H. P. Folsom” while the assessment was made to “W. H. Folsom et al.” This was held to be a non-compliance with the statute and the assessment was held to be void. (Other elements were present and the decision was also partially placed on these other grounds.)

In *Tintic Undine Mining Company vs. Ercanbrack*, 93 U. 561, 74 P. 2d 1184, this court held that these requirements of the statute relative to the names of the owners was jurisdictional.

“The officers who execute this power” (of assessment) “should follow the steps outlined for its exercise with precision. It is a special jurisdiction and must be strictly pursued. As was said in *Wister v. Kemmerer*, 2 Yeates 100, ‘An exact and punctual adherence to the laws can alone divest the title of lands on a sale for nonpayment of taxes.’ When the statutes governing the sale of lands for taxes direct an act to be done, or the manner, time, form, or place of doing it, such act must be done as prescribed, and the statutes must be strictly, if not literally, complied with. *Jungk vs. Snyder*, 28 Utah 1, 78 P. 168; *Moon v. Salt Lake County*, 27 Utah 435, 76 P. 222; *Asper v. Moon*, 24 Utah 241, 67 P. 409; *Bean v. Fairbanks*, 46 Utah 513, 151 P. 338; *Hatch vs. Edwards*, 72 Utah 113, 269 P. 138; *Olsen vs. Bagley*, 10 Utah 492, 37 P. 739; *Eastman vs. Gurrey*, 15 Utah 410, 49 P. 310.” (*Tintic Undine Mining Company vs. Ercanbrack*, 93 U. 561, 74 P. 2d 1184, 1187.)

A similar result was arrived at in *McCarthy vs. Union Pacific Railway Company*, 58 Wyo. 308, 131 P. 2d

326, where the court invalidated a tax sale based on an assessment to "Madden Bros." when it should have been to Michael S. Madden.

Certainly in the case at bar, where a deed to Charles E. Davey and Mary D. Cutler and Ether M. Davey was recorded in 1928 (Exhibit 3, entry 11 of abstract of title), a 1934 assessment to "Charles E. Davey, et al," only, was invalid under the foregoing authorities.

For the reasons indicated above, it is respectfully submitted that the judgment of the lower court should be affirmed and this appeal dismissed.

IRWIN CLAWSON

*Attorney for Defendants and
Respondents Davey*